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IN THE

Supreme Court of the United States

OCTOBER TERM, 1967

JOSEPHINE HANNER,
Petitioner,

v.

CECIL DEMARCUS,
Respondent,

No. 497

PETITIONER'S REPLY BRIEF

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SUMMARY OF RESPONSE

The respondent herein would appear to agree with the principal contentions of the petitioner to the effect that the notice provided the petitioner, relative to the sale of her real property, was insufficient as a matter of fact and law to constitute due process, and that, therefore, there was an abuse of due process in violation of Amendment XIV, Constitution of the United States. The main, if not the sole, serious attack of the respondent is purely on the ground that the Federal question was not properly preserved in the Courts of Arizona. We believe that both this and the other arguments of respondent are in error.

ARGUMENT

The Federal Question Was Properly Before the Arizona Courts and Before This Court.

Respondent argues that the question of notice was not presented to the Supreme Court of Arizona until the petition for rehearing, and that, therefore, this Court may not entertain such an argument. We disagree.

We are initially faced with the somewhat embarrassing fact that the briefs filed in the Supreme Court of Arizona have not been printed in the Appendix of Record herein. We can only state that since the argument of respondent that there was a failure to preseve the Federal question was not raised in response to the Petition of Certiorari herein, it was not thought necessary to reprint the briefs, a lengthy and expensive process. We assume, however, that the provisions of Rule 36(2), especially the last sentence thereof, will apply. The basic attack of the petitioner herein on the decision of the Supreme Court of the State of Arizona is set forth in the Questions Presented For Review set forth on pages 5 and 6 of the Petitioner's Opening Brief, and also set forth in the Petition for Certiorari. What we are attacking here is a procedure, not a statute. We believe it is quite evident from the brief of the petitioner filed in the Supreme Court of the State of Arizona, that the entire procedure of execution, levy and sale

without notice was one of the basic complaints of Mrs. Hanner. (Appellant's Opening Brief, Supreme Court of Arizona, page 4, page 8, 7) These pages are cited in addition to the matters noted by the respondent. Also see Appellant's Opening Brief, Supreme Court of Arizona, Issues, pages 15, 16.

The opinion of the Supreme Court of Arizona (A. 23-27) clearly indicates that lack of notice of the execution proceedings was one of the claims of Mrs. Hanner which was denied by the Court. It also noted that this claim included a prayer that due process had been denied her. The only "method" before the Supreme Court, which method it held to be proper and neither "vague or lacking in the protections guaranteed by the Due Process clauses of either the Arizona or Federal Constitutions" was the method used, execution upon the real property of JOSEPHINE HANNER, levy and sale.

Nor can we admit that a Motion for Rehearing is meaningless. Its denial is essential to the invocation of the jurisdiction of this Court in cases arising in a forum providing such a method of additional review. Under Arizona law the mandate of the Supreme Court to the lower Court containing the terms of affirmance, reversal or modification cannot issue until the motion has been considered and a ruling made, *Rule 14(a), Rules of the Supreme Court Arizona.*

We do not believe that the cases cited by the respondent support the conclusion which he seeks to urge upon this Court now. In *Radio Station WOW, Inc. vs. Johnson,* 326 U.S. 120, an argument was made that the Federal Communications Act had entirely withdrawn from the State Court there involved jurisdiction over the properties of the radio station. This Court noted in its decision that it was "only after the Nebraska Supreme Court's original opinion did petitioners, by motions to dismiss the suit and for rehearing, claim that the Nebraska Courts were wholly without jurisdiction over the controversy." Clearly, this preemption argument was never raised until the conclusion of the state proceedings. This is simply not true herein. In the second case cited, *Godchaux Co. vs. Estopinal,* 251 U.S. 179, the argument

that a state constitutional provision was invalid "because of conflict with the Federal Constitution" was not urged in any way "until it applied for a rehearing in the Supreme Court". As this Court noted, the appeal to the Supreme Court of Louisiana was based only upon the argument that an amendment to the Louisiana Constitution deprived the trial Court (or the state Courts in general) of jurisdiction over the subject matter. Again, there is no parallel with our present case. Mrs. Hanner argued consistently that the taking of property without notice was a violation of her Federal Constitutional rights. In the Louisiana case, the question of conflict with Federal Constitutional provisions was not made until the close of the proceedings, and in the radio station case the argument of preemption was not made until the close of the state Court proceedings.

The third case cited by the respondent, *Simmerman vs. State of Nebraska,* 116 U.S. 54, is somewhat more barren as to the record, but it is clear that the Court held that there was a failure to raise Federal objection throughout the proceedings. The Court held that: "It nowhere appears from this record (citing virtually every trial and appellate proceeding) that any Federal question was actually presented for consideration. . . ."

We assume from the fact that no mention is made of the trial Court proceedings, that respondent agrees that this question was preserved beyond all doubt at the trial stages. See paragraph III of the Affirmative Defenses in the original answer of JOSEPHINE HANNER (A. pages 9-10) the affidavit submitted for the purposes of opposing summary judgment (A. 17-18); the Motion for New Trial (A. 21), all of which allege lack of notice and its consequent violation of the Federal Constitution.

The essential fact remains that petitioner herein steadfastly and continuously complained that lack of notice of the execution upon her real property deprived her of that property in violation of the Constitution of the United States. While the emphasis of the argument may have varied, the issue was always present and before all Courts which considered the question. The petitioner may have emphasized a particular right to notice under Rule 53

in her Opening Brief before the Arizona Supreme Court, rather than the general right to notice under execution sales statutes, but both arguments were made at all state levels. Her injury, the loss of her property, was alleged; the cause, no notice of execution proceedings, was alleged; the Constitutional deprivation was alleged. The Supreme Court of Arizona in its decision noted the constitutional claim and denied it. The fact that their denial was summary does not make it any less a denial.

There is No Question of Tender Before the Court

Respondent attempts to make an issue of failure of equity on the part of the petitioner by alleging that she should have tendered the amount of the judgment. In the Courts of Arizona, the petitioner consistently urged the reasonable argument that a Master's fee was in the nature of costs and would abide the outcome of the appeal. We are not concerned with the merits or demerits of this legal position; suffice to say that this argument has some legal support, and it was upon this that petitioner relied. (Opening Brief of Appellant, Arizona Supreme Court, pages 35-37) We believe that tender, as a basis for equitable redress, is only required where a party admits an obligation or part of any obligation. Where the refusal to pay is based on a reasonable legal conclusion that there is either no obligation, or no present obligation, there has been no inequity.

Of course, once the quiet title action was commenced, there was no requirement of tender at all, as respondent DeMarcus was asserting his title to the land, not his claim for money. There would be no reason to believe that one asking that title be quieted in him would accept money in lieu of the title thus asserted.

Further, see the affidavit of JOSEPHINE HANNER (A. page 44) to the effect that Mr. DeMarcus had stated to her that he would wait until the final determination of the divorce proceedings in the Arizona Supreme Court for the payment of his fee. This not only precludes any proper demand that tender should have been made by Mrs. Hanner, but further points out the inequities practiced by respondent herein.

There should be no practical difficulty or concern as to the final adjustment of equities. This Court is empowered by its mandate to set terms upon the payment of the judgment fee awarded DeMarcus herein if the execution, levy and sale are set aside. The Arizona Supreme Court did precisely the same thing in *Blasingame vs. Wallace,* 32 Ariz. 580, 261 Pac. 42.

DeMarcus Was Still Apparently Under the Aegis of the Superior Court and May Not Take Undue Advantage of It.

The respondent now argues that at the time of the execution he was "not acting as an officer of the Court". This is no answer to the argument that he was still an officer of the Court and acting under its aegis. As noted above, and as further pointed out by the affidavit of counsel for Mrs. Hanner (A. 43) Mr. DeMarcus was aware of the pendency of the apeal. While the precise amount of his fee was not an issue, there was an issue as to whether or not Mrs. Hanner should have paid all of it. In addition, the division of community property in itself was part of the subject of the appeal. *Hanner vs. Hanner,* 95 Ariz. 191, 388 P.2d 39. While DeMarcus might not have been actually acting as a Master at the time of the execution, he was still very much a part of the proceedings and was aware of it.

Nor can we see any validity to the respondent's argument concerning the price the property brought at the sale. We are not dealing with the situation of an independent third party bidding in at the sale. We are concerned with a direct party to the case, one who had actual knowledge of his own investigation of the value of the property concerned.

SUMMARY

We wish to reiterate that we are not asking this Court to declare any statute or rule of Court of the State of Arizona invalid. We believe that these statutes properly applied would provide sufficient notice. The point is, however, that no notice was in fact provided. If in fact none of the statutes had been followed, but

actual notice were given to Mrs. HANNER, the presence or absence of the statutes would be immaterial, equity would have been done. We have set forth the appropriate statutes, ARS 12-1281; 12-1282; 12-1552; 12-1553; 12-1562; 12-1559; 12-1621; and Arizona Rules of Civil Procedure, Rule 53(a), merely to show that our statutes and rules do require notice. The insuperable fact remains that no notice at all was given. It matters little which statute you claim was violated by the failure of notice, as long as due process was violated by the fact that no notice was given. Essential and elemental due process requires notice, and we believe, therefore, requires the reversal of the decision of the Supreme Court of the State of Arizona insofar as these parties are concerned.

Respectfully submitted,

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